

Table of Contents

**PART I LEGAL MALPRACTICE LAW
AND DEFENSES.....1**

Chapter 1: Legal Elements of a Claim3

1-1 INTRODUCTION.....3

1-2 DUTY.....4

 1-2:1 Generally.....4

 1-2:2 Duty to Client.....5

 1-2:2.1 Who is the Client?.....5

 1-2:2.2 Express Attorney-Client Relationship.....6

 1-2:2.3 Implied Attorney-Client Relationship.....6

 1-2:2.4 Providing Legal Opinions to Clients for
 Use by Others 12

 1-2:3 Duty to Non-Clients..... 14

 1-2:3.1 Generally 14

 1-2:3.2 Third-Party Beneficiaries 15

 1-2:3.3 Foreseeable Reliance 16

 1-2:3.4 Voluntary Agency 19

 1-2:3.5 Use of Disclaimers.....21

1-3 BREACH23

 1-3:1 Breach of Duty Required.....23

 1-3:2 Standard of Care24

 1-3:3 Factors Establishing Breach.....25

 1-3:3.1 Generally25

 1-3:3.2 Failing to Properly Advise Clients.....25

 1-3:3.3 Adverse Results.....26

 1-3:3.4 Undertaking to Accomplish
 a Specific Result.....27

 1-3:3.5 Failing to Obtain Client Authority.....29

 1-3:3.6 Ethical Rules.....30

 1-3:3.7 Use of Expert Testimony31

1-4 PROXIMATE CAUSE32

 1-4:1 Generally32

Table of Contents

- 1-4:2 Client Would Have Prevailed, Absent the Alleged Malpractice 33
- 1-4:3 Collectability of Underlying Judgment 39
- 1-4:4 Viability of Underlying Action 40
- 1-4:5 Negligence in Appeals..... 48
- 1-4:6 Criminal Representations 50
- 1-5 DAMAGES 52
 - 1-5:1 Damages Required for Cause of Action 52
 - 1-5:2 Damages Cannot be Speculative 52
 - 1-5:3 Expenses of Litigation 53
 - 1-5:4 Loss of Settlement Position 54
 - 1-5:5 Punitive Damages 55
 - 1-5:5.1 Grounds for Punitive Damages in Malpractice Actions..... 55
 - 1-5:5.2 Punitive Damages from the Underlying Action..... 60
- Chapter 2: Additional Requirements for a Malpractice Claim..... 63**
- 2-1 REQUIREMENTS OUTSIDE NEGLIGENCE ELEMENTS 63
- 2-2 AFFIDAVIT REQUIREMENT UNDER O.C.G.A. § 9-11-9.1..... 63
 - 2-2:1 Scope and Applicability of O.C.G.A. § 9-11-9.1 63
 - 2-2:2 When Is an Affidavit Necessary?..... 65
 - 2-2:2.1 Generally 65
 - 2-2:2.2 Professional Negligence 65
 - 2-2:2.3 Other Claims Against Attorneys and Law Firms..... 71
 - 2-2:2.3a Not All Claims Require Affidavit..... 71
 - 2-2:2.3b Intentional Conduct 72
 - 2-2:2.3c Fraud 72
 - 2-2:2.3d Contract Actions 73
 - 2-2:2.3e Multiple Claims 73
 - 2-2:2.4 Type of Plaintiff 74
 - 2-2:2.4a Different Types of Plaintiffs.... 74
 - 2-2:2.4b Professional as Plaintiff 74
 - 2-2:2.4c Pro Se Plaintiff 74
 - 2-2:2.5 Counterclaims and Third Party Claims..... 75
 - 2-2:2.6 Clear and Palpable Negligence..... 75
 - 2-2:3 What Should the Affidavit Say? 76
 - 2-2:4 What Makes a Qualified Expert? 78

Table of Contents

2-2:5	Timing and Authenticity of Affidavit.....	81
2-2:5.1	Timing of the Affidavit and the Statute of Limitations.....	81
2-2:5.2	Curing Deficiency or Amending Complaint.....	82
2-2:5.3	Oath and Authenticity	84
2-2:6	Effect of a Motion to Dismiss.....	86
2-2:7	Waiver	87
2-2:8	9.1 Affidavits as a Basis for an Independent Malpractice Action	89
2-3	OTHER USES OF EXPERT EVIDENCE IN MALPRACTICE CASES.....	90
2-3:1	Expert Evidence at Summary Judgment	90
2-3:2	Other Requirements for Expert Testimony.....	92
2-4	STATUTES OF LIMITATION	93
2-4:1	Introduction	93
2-4:2	Statute of Limitation for Actions Sounding in Contract	94
2-4:2.1	Type of Contract	94
2-4:2.2	What Constitutes a Written or Oral Contract Between an Attorney and Client?.....	95
2-4:2.3	The Impact of <i>Newell Recycling</i>	96
2-4:3	Statute of Limitation for Actions Sounding in Tort.....	99
2-4:3.1	Categories of Tort Actions.....	99
2-4:3.2	Malpractice Actions That Allege Tortious Injury.....	100
2-4:3.3	Pure Tort Actions Against Attorneys.....	102
2-4:4	When Does a Malpractice Action Accrue?	103
2-4:4.1	Date of Breach	103
2-4:4.2	Damages Required.....	104
2-4:4.3	Failure to Correct an Act of Malpractice...	106
2-4:4.4	The “Springing” Statute of Limitation	107
2-4:5	Tolling the Statute of Limitation	108
2-4:5.1	Introduction	108
2-4:5.2	Fraud.....	108
2-4:5.2a	Intentional.....	108
2-4:5.2b	Acts of Fraud Must be Distinct from Acts of Malpractice.....	109

Table of Contents

	2-4:5.2c	Significance of the Attorney-Client Relationship.....	110
	2-4:5.2d	Discovery of Fraud.....	113
	2-4:5.3	Client’s Mental Incapacity	113
	2-4:5.4	Tolling Agreements	114
	2-4:6	Statutes of Limitation vs. Statutes of Repose	115
2-5		WAIVER OF PRIVILEGE	116
2-6		ATTACKING THE UNDERLYING CLAIM NOT NECESSARY AS PREREQUISITE TO MALPRACTICE ACTION	121
2-7		MALPRACTICE CASES BASED ON ATTORNEY’S SETTLEMENT AUTHORITY	123
2-8		FIDUCIARY DUTY	124
2-9		PERSONAL JURISDICTION	129

Chapter 3: Liability for or in Conjunction With the

		Conduct of Others.....	131
3-1		INTRODUCTION.....	131
3-2		AGENCY LAW GENERALLY.....	131
3-3		VICARIOUS LIABILITY IN LAW FIRM PARTNERSHIPS	132
	3-3:1	Partners Can Contractually Modify Statutory Liability	132
	3-3:2	Liability of Individual Partners for Their Own Acts.....	133
	3-3:3	Liability of Partnership for Acts of Individual Partners	133
	3-3:4	Liability of Individual Partners (and Exposure of Their Personal Assets) for Acts of the Partnership or Other Individual Partners.....	134
	3-3:4.1	Different Liability for General Partners and Limited Liability Partners	134
	3-3:4.2	Liability of General Partners	134
	3-3:4.3	Liability of Limited Partners and Limited Liability Partners.....	135
3-4		VICARIOUS LIABILITY IN ATTORNEY-CLIENT RELATIONSHIP.....	137
	3-4:1	Client Liability for Actions of Attorney	137
	3-4:2	Attorney Liability for the Actions of a Client.....	139
3-5		ATTORNEY LIABILITY FOR ASSISTING CLIENTS WITH WRONGFUL CONDUCT.....	140

Table of Contents

	3-5:1 Introduction	140
	3-5:2 Liability for Abusive Litigation.....	141
	3-5:3 Tortious Interference	144
	3-5:4 Conspiracy.....	145
	3-5:5 Negligence	146
3-6	VICARIOUS LIABILITY IN RELATIONSHIPS BETWEEN INSURANCE REPRESENTATIVES AND THE ATTORNEYS THAT THEY HIRE	148
	3-6:1 Liability of Attorney for Actions of Insurance Representative/Adjuster	148
	3-6:2 Liability of Insurance Company for Actions of Attorney Representative.....	149
	 Chapter 4: Defenses to Legal Malpractice Claims.....	 153
4-1	INTRODUCTION.....	153
4-2	GENERAL DEFENSES	153
	4-2:1 Elements of Claim Lacking	153
	4-2:2 Duty	154
	4-2:3 Breach of Standard of Care.....	158
	4-2:3.1 Generally	158
	4-2:3.2 Failure to Prove Breach.....	158
	4-2:3.3 Judgmental Immunity.....	159
	4-2:3.4 Settled Law	164
	4-2:3.5 O.C.G.A. § 9-11-9.1 Affidavit	165
	4-2:4 Causation	165
	4-2:4.1 Generally	165
	4-2:4.2 Events That Break the Causal Chain Between Breach and Damages	166
	4-2:4.2a Generally	166
	4-2:4.2b The Client’s Duty To Read....	167
	4-2:4.2c Withdrawal or Substitution of Counsel As a Basis for a Malpractice Claim	172
	4-2:4.3 Contributory Negligence	175
	4-2:4.4 Lack of Standing to Pursue Underlying Claim	177
	4-2:5 Damages.....	178
4-3	AFFIRMATIVE DEFENSES	179
	4-3:1 Introduction	179
	4-3:2 Collateral Estoppel, Res Judicata, and Judicial Estoppel.....	179
	4-3:2.1 Distinctions	179

Table of Contents

4-3:2.2	Collateral Estoppel	181
4-3:2.3	Res Judicata	183
4-3:2.4	Judicial Estoppel.....	185
4-3:3	Release.....	186
4-3:4	Waiver	187
4-3:5	Statute of Limitation	190
PART II LEGAL MALPRACTICE PREVENTION... 191		
Chapter 5: Structuring a Law Firm Under Georgia Law..... 193		
5-1	INTRODUCTION.....	193
5-2	GENERAL PARTNERSHIPS.....	194
5-3	PROFESSIONAL ASSOCIATIONS	195
5-4	LIMITED LIABILITY PARTNERSHIPS	196
5-4:1	Introduction	196
5-4:2	Executing a Written Partnership Agreement That Complies With Georgia Statute.....	197
5-4:3	Defining a Partnership as a Limited Liability Partnership	197
5-4:4	Ensuring That the Individual Assets Belonging to Each Partner are Protected	198
5-5	ADDITIONAL ISSUES COMMON TO ALL STRUCTURES	199
5-5:1	Introduction	199
5-5:2	Identify What Happens When a Partner or Equity Holder Leaves the Firm	199
5-5:3	Periodically Re-Review the Partnership Agreement or Articles of Incorporation	200
5-5:4	Consider Accountability by Contract	201
5-5:5	Sharing Office Space	201
5-5:6	Suicide Prevention and Substance Abuse.....	203
5-5:6.1	Talk About Suicide and Substance Abuse as a Risk	204
5-5:6.2	Identify and Communicate Solutions.....	205
5-5:6.3	Watch for Warning Signs	206
5-5:6.4	Act When You See Warning Signs	206
Chapter 6: Internal Audit..... 209		
6-1	PROCEDURAL CATEGORIES.....	209
6-2	PRE-FILE OPENING.....	209
6-2:1	General Considerations	209
6-2:2	Identify the Client.....	210

Table of Contents

6-2:3	Conflicts of Interest	211
6-2:4	The Attorney's Expertise	211
6-2:5	Fee Arrangement	212
6-2:6	Reasonableness of the Fee Agreement	217
6-2:7	Arbitration Provisions in Fee Agreements	222
6-2:8	Anticipating Withdrawal.....	225
6-2:9	Creating an Attorney-Client Relationship	227
6-3	FILE OPENING.....	229
6-3:1	Documentation.....	229
6-3:2	Engagement Letters and Fee.....	229
6-3:2.1	Format.....	229
6-3:2.2	What Should be Included in the Engagement Letter or Fee Contract?	229
6-3:2.3	Should Attorneys Use an Engagement Letter or a Retainer Letter?.....	230
6-3:3	File Opening Memos	232
6-4	REPRESENTATION OF THE CLIENT	232
6-4:1	The Obligations of a Georgia Attorney	232
6-4:2	Areas in Which Attorneys are Particularly Susceptible to Legal Malpractice Claims	233
6-4:3	Calendar Control Systems	236
6-4:4	Communication	237
6-4:5	Financial Controls	240
6-4:6	Billing Procedures	241
6-5	WITHDRAWING FROM AN ATTORNEY-CLIENT RELATIONSHIP.....	241
6-5:1	When to Withdraw.....	241
6-5:2	How to Withdraw	242
6-6	FILE CLOSING	243
	Chapter 7: Identifying and Resolving Conflicts of Interest	245
7-1	OVERVIEW OF CONFLICTS OF INTEREST	245
7-2	THE INTERSECTION OF ETHICS AND MALPRACTICE	245
7-3	MULTIPLE REPRESENTATION.....	246
7-3:1	Conflict Creates Breach of Duty of Loyalty	246
7-3:2	Multiple Representation in General	247
7-3:3	Application of Rule 1.7 in Georgia	248
7-3:3.1	Introduction	248
7-3:3.2	Will the Representation Adversely Affect Another Client?.....	248

Table of Contents

	7-3:3.3	Is the Conflict Waivable?.....	249
	7-3:3.4	Has the Attorney Fully Advised the Clients of the Risks Related to the Conflict?	250
	7-3:3.5	Has the Client Adequately Consented to the Representation?	251
	7-3:4	Disqualification Due to Multiple Representation.....	251
	7-3:5	Imputed Disqualification	253
7-4		SUCCESSIVE REPRESENTATION: THE FORMER CLIENT RULE.....	257
	7-4:1	Screening of Non-Attorney Staff and Successive Conflicts of Interest	266
7-5		INTERMEDIARY REPRESENTATION.....	267
7-6		PROHIBITED TRANSACTIONS	269
7-7		CONFLICTS ISSUES UNIQUE TO SPECIFIC REPRESENTATIONS	271
	7-7:1	Issues Unique to Corporate Representation.....	271
	7-7:2	Issues Unique to Criminal Representations	274
	7-7:3	Issues Unique to Internal Investigations	275
	7-7:4	Issues Unique to In-House Counsel.....	276

Chapter 8: Email & Attorney Marketing: New Issues in the Practice

		of Law in the 21st Century	279
8-1		INTRODUCTION.....	279
8-2		EMAIL AND MALPRACTICE	279
	8-2:1	Email Communication's Impact on Practice of Law Generally	279
	8-2:2	Using Email as a Calendar Reminder System	280
	8-2:3	Lack of a Systematic Approach to Handling Emails.....	282
	8-2:3.1	Introduction	282
	8-2:3.2	How Attorneys Can Determine if an Email Problem Exists	282
	8-2:3.3	Types of Email Problems	283
	8-2:3.3a	“Subject Surfing”	283
	8-2:3.3b	“Attachment Deferral”.....	283
	8-2:3.3c	“Email Skimming”.....	283
	8-2:3.3d	“Email Billing”	284
	8-2:3.4	Addressing an “Email Problem”	284
	8-2:3.4a	Introduction	284
	8-2:3.4b	Electronic Cut-Off for Old Emails.....	284

Table of Contents

	8-2:3.4c	Electronic Cut-Off for Too Many Emails.....	285
8-2:4		Managing Risk of Malpractice Claims from Third-Party Email Recipients.....	285
	8-2:4.1	Risk of Third-Party Claims Generally	285
	8-2:4.2	The Risk That Emails Will be Forwarded	286
	8-2:4.3	The Risk of an Unintended Recipient	287
	8-2:4.4	One Solution: Email Disclaimers	288
8-3		SOCIAL NETWORKING AND MALPRACTICE.....	290
	8-3:1	Risks of Social Media Generally	290
	8-3:2	Risk of Implied Attorney-Client Relationship.....	291
	8-3:3	Risk of Unauthorized Practice of Law	293
	8-3:4	Solution	293
8-4		ADDRESSING THE MEDIA	295
	8-4:1	The Client’s Instructions	295
	8-4:2	Materially Prejudicing an Adjudicative Proceeding	296
	8-4:3	Defensive Responses	296
	8-4:4	Reviewing the Rules	297
8-5		CO-WORKING SPACES	298
	8-5:1	Signage and Advertising	298
	8-5:2	Firm Materials and Operations	299
	8-5:3	Separate Systems	300

Chapter 9: Jury Selection and Persuasion:

		Ethics for the Trial Practitioner	301
9-1		THE RULES	301
	9-1:1	Introduction	301
	9-1:2	Trial Conduct	301
	9-1:3	Disclosing Adverse Authority and the Duty of Candor.....	302
	9-1:4	Degrading the Court.....	303
	9-1:5	Perjury by the Client.....	305
	9-1:6	Attorney as a Witness.....	306
	9-1:6.1	Potential Issues	307
		9-1:6.1a Confidentiality.....	307
		9-1:6.1b Attorney-Client Privilege	308
		9-1:6.1c Work Product	310
		9-1:6.1d Conflict of Interest	311
	9-1:6.2	Serving as an Advocate and a Witness	312
	9-1:6.3	Steps to Take if Called as a Witness.....	313

Table of Contents

9-1:7	Contact with Witnesses.....	315
9-1:8	Communications with Jurors and Officials	319
9-1:8.1	Ex Parte Communication.....	319
9-1:8.2	Communication with Jurors.....	320
9-1:8.3	Communication with Officials	321
9-1:9	Trial Publicity	322
9-2	JUDICIAL DECISIONS GOVERNING ATTORNEY TRIAL CONDUCT.....	326
9-2:1	Introduction	326
9-2:2	Opening Statement	326
9-2:3	Questions From the Jury.....	328
9-2:4	Closing Statement.....	330
9-2:5	Conflicts Between the Court and Trial Counsel	331
	Chapter 10: Sanctions.....	335
10-1	BASES FOR SANCTIONS GENERALLY	335
10-2	DISCOVERY SANCTIONS	335
10-3	ATTORNEYS' FEES AND EXPENSES.....	337
10-3:1	Bases for Imposing Fees and Expenses Generally	337
10-3:2	Mandatory Liability	338
10-3:3	Discretionary Liability.....	339
10-3:4	Actions Under O.C.G.A. § 13-6-11	341
10-3:5	Defenses	342
10-4	ABUSIVE LITIGATION.....	342
10-5	CONTEMPT.....	342
10-5:1	Courts' Inherent Power	342
10-5:2	Contempt.....	344
	PART III INSURANCE AND LOSS AVOIDANCE ...	347
	Chapter 11: Purchasing Legal Malpractice Insurance.....	349
11-1	INSURANCE POLICY IS A CONTRACT	349
11-2	FACTORS TO CONSIDER WHEN CHOOSING AN INSURANCE PROVIDER	350
11-2:1	Consider Scope and Type of Coverage	350
11-2:2	Factors to Analyze in Choosing a Carrier.....	350
11-2:3	Look at the Insurance Industry Rating of the Carrier	351
11-3	COVERAGE PROVISIONS	352
11-3:1	The Insuring Agreement	352
11-3:2	Scope of Coverage, Generally	352

Table of Contents

11-3:3	Prior Acts Coverage.....	353
11-3:4	Prior Law Firm Distinguished from Predecessor Firm.....	354
11-3:5	Personal Injury Liability.....	354
11-3:6	Innocent Insured Coverage.....	354
11-3:7	Retroactive Date.....	355
11-3:8	Inception Date.....	356
11-3:9	Expiration Date.....	356
11-3:10	Benefitting from Coverage.....	356
11-4	WHO IS INSURED?.....	357
11-4:1	Generally.....	357
11-4:2	Definition of “Insured” and “Predecessor Firms”.....	357
11-4:3	Changes or Additions to Named Insured.....	357
11-5	LIMITS AND DEDUCTIBLES.....	358
11-5:1	Impact on Coverage and Settlement.....	358
11-5:2	Limits.....	358
11-5:3	Deductible and Self-Insured Retentions.....	359
11-5:4	Defense of Disciplinary Proceedings.....	359
11-5:5	Defendant’s Reimbursement.....	360
11-5:6	Defense Costs and Claim Expenses Within Policy Limits.....	360
11-5:7	What are “Endorsements”?.....	361
11-6	EXCLUSIONS.....	362
11-6:1	Exclusions Generally.....	362
11-6:2	Bodily Injury/Property Damage Exclusion.....	362
11-6:3	Securities Exclusion.....	362
11-6:4	Institution Exclusion.....	363
11-6:5	Workers’ Compensation Claims Exclusion.....	363
11-6:6	Contractual Exclusion.....	363
11-6:7	Dishonest, Fraudulent, Malicious or Criminal Acts Exclusion.....	363
11-6:8	Personal Profit Exclusion.....	364
11-6:9	Insured vs. Insured Exclusion.....	364
11-6:10	Business Enterprise Other Than Named Insured Exclusion.....	364
11-6:11	Business Enterprise Owned by Attorney or Spouse Exclusion.....	364
11-7	EXTENDED REPORTING PERIODS.....	365
11-7:1	Claims-Made Policies.....	365
11-7:2	Extended Reporting Periods (ERP) Options.....	365
11-7:3	Mini-Tail Availability.....	365
11-8	DEFENSE AND SETTLEMENT.....	366

Table of Contents

11-8:1 Duty to Defend.....366

11-8:2 Insured’s Consent to Settlement.....366

11-8:3 Insurer’s Consent to Settlement366

11-8:4 Arbitration of Claims367

11-8:5 Subrogation367

11-9 TERMS AND CONDITIONS367

11-9:1 Effect of Terms and Conditions.....367

11-9:2 Notice.....368

11-9:3 Territory368

11-9:4 Other Insurance.....368

11-9:5 Assignment of the Policy to a Third Party369

11-9:6 Cancellation.....369

11-9:7 Legal Action Limitation370

11-10 EXPOSURE OR NON-COVERAGE AS A RESULT
OF THE INSURANCE APPLICATION PROCESS370

11-10:1 Introduction370

11-10:2 Rescission of Policy for Misrepresentation
in Application370

11-10:3 Policy Exclusions for Acts “Arising Out Of”
Excluded Claims373

Chapter 12: The Tripartite Relationship.....375

12-1 RELATIONSHIP BETWEEN INSURER, INSURED
AND INSURED’S ATTORNEY375

12-2 RULES OF PROFESSIONAL CONDUCT376

12-3 WHO IS THE CLIENT?.....378

12-4 COMPLICATIONS ARISING FROM THE
RETENTION OF PANEL OR CUMIS COUNSEL.....378

12-5 DOES A RESERVATION OF RIGHTS
LETTER CREATE A CONFLICT?.....380

12-6 CONFLICTS ARISING FROM THE
ATTORNEY-CLIENT PRIVILEGE.....380

12-7 WHO OWNS THE CLAIM AGAINST THE
ATTORNEY IN THE TRIPARTITE RELATIONSHIP:
THE INSURED OR THE INSURER?382

12-7:1 Insurer’s Standing to Sue Defense Counsel
for Legal Malpractice382

12-7:2 If an Insurer Does Have Standing to Sue Defense
Counsel Directly for Malpractice, Can Both the
Insured and the Insurer Bring a Claim?383

Table of Contents

Chapter 13: Handling a Claim: Four Steps for Attorneys Who Discover an Error or Receive a Legal Malpractice Claim385

13-1 INTRODUCTION.....385

13-2 NOTIFY THE CLIENT OF THE ERROR, WITHOUT ADMITTING LIABILITY385

13-2:1 Giving General Notice of Error.....385

13-2:2 Admitting Liability May Give Support to an Otherwise Weak Malpractice Claim.....386

13-2:3 Admitting Liability May Lead to a Lack of Insurance Coverage.....388

13-2:4 Denying Responsibility When Claims are Asserted May Lead to Liability.....388

13-3 IDENTIFY LEGAL MALPRACTICE CARRIER TO THE CLIENT389

13-4 ADVISE THE CLIENT TO OBTAIN INDEPENDENT COUNSEL389

13-4:1 Attorney’s Options Concerning Representation of Client After Error.....389

13-4:2 Continuing the Representation of the Original Matter390

13-4:3 Advising the Client to Obtain Separate Counsel While Remaining Involved as Co-Counsel.....390

13-4:4 Withdrawing From the Matter Entirely391

13-5 NOTIFY MALPRACTICE INSURANCE CARRIER WITHOUT DELAY391

Appendix393

Table of Cases.....399

Index417

